NO. 42798-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ERIC BARUCH CAMPOS ORTIZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly G. Grant

No. 11-1-02794-7

Response Brief

MARK LINDQUIST
Prosecuting Attorney

By
MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exclude an out-of-court statement by the defendant where defendant attempted to offer the statement into evidence?

B. STATEMENT OF THE CASE.

1. Procedure

On July 11, 2012, the Pierce County Prosecutor's Office (State) charged Eric Baruch Campos Ortiz (defendant) with one count of unlawful possession of cocaine. CP 1. Defendant's jury trial began on October 12, 2012, before the Honorable Beverly G. Grant. RP 63.

During motions in limine, the court excluded an out-of-court statement, at issue below, made by defendant if offered by defendant into evidence. RP 34, 58–59, 142–43, 184–88. The State called four witnesses: a motel manager, two patrol officers, and a forensic scientist. RP 64, 124 145, 157. Defendant was the only witness who testified on his behalf. RP 168.

The jury found defendant guilty as charged. CP 67. On November 10, 2011, the court sentenced defendant to three months in custody.[1] CP 81. Defendant timely filed this appeal that same day. RP 87.

---

[1] Defendant's offender score was zero, with a standard range of zero to six months. CP 78.

2. Facts

In the early morning of July 2011, James Fowler, the manager of the Tacoma Center Motel, saw defendant outside in the motel's courtyard looking for the key to his car. RP 64–66. Defendant was parked outside of a room that was being rented to two persons, Michael Hepburn and Kevin Moultry. RP 70–71. Mr. Fowler saw defendant speaking on and off with Mr. Hepburn while walking in and out of the room. RP 98–99. The motel parking lot was normally blocked off with a chain link fence, and guests are required to check in with the front office. RP 66–67.

Mr. Fowler approached defendant and offered to help look for the key, provided a flashlight, and then noticed the car did not have an ignition. RP 67. Mr. Fowler told defendant that he needed to provide some identification or leave the property. RP 68. Defendant left twenty minutes later. RP 68.

Almost a week later, Mr. Fowler saw defendant again, this time through his office window as defendant was trying to open the gate and enter the property. RP 68. From his window, Mr. Fowler told defendant he had to come into the office and check in before entering the motel parking. RP 68. Defendant went into the office, interrupted Mr. Fowler while he was helping another customer, and left the office after Mr. Fowler requested that defendant wait until he finished with his other customer. RP 69. As defendant approached the gate again, Mr. Fowler repeated his instructions to come into the office and provide some identification or

leave. RP 69. Defendant approached Mr. Fowler from the other side of the window, screamed various threats, cussed, grabbed Mr. Fowler's hand, and tried pushing up the window when Mr. Fowler tried closing the window. RP 69. Mr. Fowler called the police, but defendant left before they arrived. RP 69.

When officers arrived, they went with Mr. Fowler to the room where Mr. Fowler had previously seen defendant to see if the tenant could provide information about defendant. RP 71, 130–31. Officers met Mr. Hepburn at the door, but failed to receive any information about defendant. RP 131. When officers returned to their vehicles, they discovered that Mr. Hepburn had two outstanding warrants for his arrest. RP 131–32. They returned to the apartment and arrested Mr. Hepburn. RP 132. Upon searching Mr. Hepburn incident to his arrest, and while Mr. Fowler was present, officers discovered a crack pipe with cocaine. RP 118, 132–33.

Mr. Fowler testified that a tenant's contract is normally terminated upon drug possession, and so he terminated Mr. Hepburn's lease immediately. RP 72. He went back to the room just moments later to secure it and bag up any of Mr. Hepburn's belongings. RP 72. When he entered the room, to his surprise, he saw defendant squatting in the corner of the kitchen, so he left the room, locked the door, and alerted officers.

RP 72–73. Officers returned to the room with Mr. Fowler and arrested defendant. RP 73.

When officers searched defendant incident to his arrest, they found a little baggie and a couple of white rocks, which a forensic scientist later confirmed to be cocaine. RP 74, 134, 149, 163. Mr. Fowler later found a crack pipe, pornography, and a passport in a bag where he had seen defendant squatting in the room. RP 75.

At trial, defendant alleged that he was at the motel to pick up some clothing for Mr. Moultry, and to drop off some cigarettes and money. RP 172. He claimed that while he was in Mr. Hepburn's bathroom changing his clothes, he heard noises outside, and that Mr. Hepburn was gone when he got out. RP 175. When he was arrested, he claimed the pants and the drugs were not his. RP 177–78.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXCLUDED DEFENDANT'S STATEMENTS BECAUSE THEY WERE INADMISSIBLE HEARSAY, AND DEFENDANT MAKES NO SHOWING THE STATEMENTS WERE OTHERWISE ADMISSIBLE

This Court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion. ***State v. Powell***, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); ***State v. Larry***, 108 Wn. App. 894, 910, 34 P.3d 241 (2001); ***State v. Stubsjoen***, 48 Wn. App. 139, 147, 738 P.2d 306 (1987)

("The decision whether to admit or refuse evidence is within the sound discretion of the trial court and will not be reversed in the absence of manifest abuse."). A trial court abuses its discretion when its decision is based on manifestly unreasonable or untenable grounds. ***Powell***, 126 Wn.2d at 258.

Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless it qualifies as an exception under the rules of evidence, court rules, or by statute. ER 802. Although a defendant's out-of-court statements are non-hearsay admissions of a party opponent when offered against him by the State, *see* ER 801(d)(2), a party's *own* out-of-court statement *offered by the party itself* is hearsay when offered to prove the truth of the matter asserted. ***State v. Sanchez-Guillen***, 135 Wn. App. 636, 645, 145 P.3d 406 (2006).

In ***Sanchez-Guillen***, the defendant had been arrested for murder and subsequently made several remarks to the arresting officers. *Id.* at 640. When the State refused to introduce the statements at trial, the defendant sought to introduce them through the officers as part of his own defense. *Id.* The trial court, however, refused the offer. *Id.* The reviewing court held that the trial court had not abused its discretion because the

statements were inadmissible hearsay where the defendant himself was seeking to introduce them. *Id.* at 645–46.

Here, defendant attempted to introduce an out-of-court statement made by defendant through Mr. Fowler. During a 3.6 hearing, Mr. Fowler testified:

> They found some drugs in his pocket. One of the officers asked him about it. He told officers, he says, "Well, those aren't my pants." He didn't say they weren't his drugs, he said those weren't his pants. And they asked him where did he get the pants from and he didn't know.

RP 34. When defense counsel moved to include a jury instruction on unwitting possession based on the testimony above, pending Mr. Fowler testifying to the same at trial, the State objected and told the court it would not be admitting that portion of Mr. Fowler's testimony:

> Prosecutor: Your Honor, if I may. This information was included in the police report. He knew that from the beginning of this case that there was an allegation that his client stated that the pants weren't his. The State is not offering that testimony. *It's self-serving hearsay. None of my witnesses will be testifying to that statement. If that gets in, the only way it gets in is if his client takes the stand and says that himself.*

RP 59 (emphasis added). The prosecutor recognized that the statement was hearsay, and if offered by the defendant, argued that it would have to come through defendant's testimony. The court apparently ruled on the

issue, stating that "[w]ell, if one of your witnesses opens the door its fair game. Okay. Anything else?" RP 59.[2]

The issue here is almost identical to the issue decided by the court in ***Sanchez-Guillen***. Defendant here sought to offer his own statement into testimony through another witness (Mr. Fowler) to prove the truth of the matter asserted (that the pants were not his).[3] The rules of evidence are clear that such a statement is hearsay. Moreover, defendant makes no showing that the statement is otherwise admissible under any of the hearsay exceptions. The trial court thus properly excluded the statement because it was inadmissible hearsay.

Defendant's argument hinges entirely on the argument that the trial court erred by excluding the statement as "self-serving" hearsay, and yet fails to show where the trial court expressly excluded the evidence as such. Brief of Appellant 10–15. Defendant relies on ***State v. Pavlik***, 165 Wn. App. 645, 268 P.3d 986 (2011), to argue that there is no "self-serving hearsay rule." Brief of Appellant 10–11. (emphasis added). In ***Pavlik***, the court had to determine whether the trial court erred when it excluded a

---

[2] The court's ruling, by its own terms, is somewhat ambiguous. However, defendant understood it impliedly to exclude Mr. Fowler's statement, *see* RP 186–87, and so he assigns error to the court's ruling on this issue. Brief of Appellant 1.

[3] Defendant did attempt to elicit testimony regarding his statement when cross-examining one of the officers who arrested him. RP 142–43. However, when the State objected to the questioning because it called for hearsay, the defense withdrew the question before the court made its ruling. RP 142–43.

statement solely because it was "self-serving." 165 Wn. App. at 651–57. The case is primarily about semantics and whether the trial court improperly excluded a statement literally because it was "self-serving" without determining whether the statement would otherwise qualify as a hearsay exception. *Id.* at 651–57 (finding that the excluded statement might otherwise have been admitted as an excited utterance, but dismissing the claim because of harmless error).

In defendant's case, however, any discussion about whether the trial excluded the statement purely because it was "self-serving" is beside the point. Defendant's argument overlooks the crux of the court's holding in ***Pavlik***, that "there is no 'self-serving hearsay' bar *that excludes an otherwise admissible statement.*" 165 Wn. App. at 653 (emphasis added). Defendant at trial, and again on appeal, fails to show how Mr. Fowler's statements were otherwise admissible. Defendant thus fails his burden to show how the trial court erred in excluding the statement.

Even if the trial court had erred by excluding the evidence, as defendant asserts, the exclusion did not materially affect the verdict. Evidentiary errors are reviewed for harmless error. ***State v. Hawkins***, 157 Wn. App. 739, 752, 238 P.3d 1226 (2010). Evidentiary errors are harmless where the error did not materially affect the verdict within reasonable probability. *Id.*

Any alleged error in this case was unmistakably harmless because defendant took the stand himself and testified to the very evidence that he claims the trial court improperly excluded. RP 177. During direct examination, when asked whether he had spoken to officers about the drugs in his pocket on the day of his arrest, defendant responded, "No. Supposedly when [the officer] said they found drugs in the pants, I told them those pants weren't mine." RP 177. Defendant was able to present his defense despite the trial court's ruling on the hearsay statement. But by finding defendant guilty, the jury apparently did not find defendant's version of the facts credible. The error was harmless because there is no reasonable probability that the alleged error affected the jury's verdict, and thus defendant was afforded his due process rights.

D. CONCLUSION.

The trial court properly excluded defendant's out-of-court statement as inadmissible hearsay when defendant attempted to offer the statement into evidence. Furthermore, defendant makes no showing that

the statement otherwise satisfies a hearsay exception. The State respectfully requests this Court to affirm defendant's conviction.

DATED: June 12, 2012.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

Kiel Willmore
Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/13/12
Date Signature

PIERCE COUNTY PROSECUTOR

June 13, 2012 - 10:59 AM

Transmittal Letter

Document Uploaded: 427982-Respondent's Brief.pdf

Case Name: St. v. Campos Ortiz
Court of Appeals Case Number: 42798-2

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: **tnichol@co.pierce.wa.us**

A copy of this document has been emailed to the following addresses:
sheriarnold2012@yahoo.com